STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 14, 2014
v	No. 311641 Oakland Circuit Court
CARLOS ALBERTO SOLERNORONA, Defendant-Appellant.	LC No. 2009-228907-FC

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right the resentencing of his convictions for conspiracy to commit armed robbery, MCL 750.529 and MCL 750.157a, and conspiracy to commit unlawful imprisonment, MCL 750.349b(1)(c) and MCL 750.157a. Defendant was originally sentenced to 210 months to 50 years' imprisonment for the conspiracy to commit armed robbery conviction. In a prior appeal, this Court affirmed defendant's convictions, but remanded for resentencing. *People v Solernorona*, unpublished opinion per curiam of the Court of Appeals, issued May 1, 2012 (Docket No. 299269), lv den 493 Mich 896 (2012), cert den __ US __; 133 S Ct 2005; 185 L Ed 2d 874 (2013). The trial court resentenced defendant to 180 months to 50 years' imprisonment. We affirm.

I. BACKGROUND

As noted in the introduction, defendant previously appealed to this Court, and this Court's previous opinion summarized the facts of the case. Since we and the parties are familiar with those facts, we need not repeat them here.

In the previous appeal, this Court determined that the trial court improperly scored OV 13 at ten points. *Solernorona*, unpub op at 10. If OV 13 had been properly scored, defendant would have been placed at OV Level II rather than Level III and his minimum sentence range should have been 51 to 85 months, rather than 81 to 135 months. *Id.* As a result, we concluded that "because [defendant's] minimum sentence range was erroneous, he is entitled to resentencing." *Id.* Regarding the sentence departure, this Court concluded that each of the three factors the trial court identified as reasons for the upward departure were properly considered, recognizing that "[t]he trial court properly adjusted the variables to reflect the facts that it believed the guidelines failed to consider." *Id.*, unpub op at 12. This Court concluded:

> In sum, we conclude that the trial court stated on the record rational reasons in support of departing from the sentencing guidelines. However, because [defendant's] correct minimum sentence range should have been 51 to 85 months, rather than 81 to 135 months, he was sentenced on the basis of inaccurate information, and we cannot determine if the trial court would have departed to the same degree absent the erroneous scoring. Therefore, we must remand for the trial court to reconsider the extent of its departure. [*Id.*, unpub op at 13.]

At resentencing, the trial court noted its familiarity with the case, and indicated that both defendant's convictions and the upward departure were affirmed and that the case was remanded because the guidelines range was inappropriately scored and the trial court was to "reconsider the extent of its departure." The trial court affirmed its decision to upwardly depart for the reasons previously cited at the original sentencing.

Regarding the extent of the departure, the trial court incorporated the analysis and findings made at the original sentencing. The trial court acknowledged that defendant's minimum sentencing guidelines range was 51 to 85 months. While noting that it previously used the sentencing grid for Class A offenses and "departed by moving two adjacent grid boxes," the trial court found this remained an appropriate upward deviation formula. This resulted in a recommended minimum sentence range of 108 to 180 months. The trial court found that defendant's sentence should be 180 months, or 15 years, to 50 years' imprisonment. Regarding the extent of the departure, the trial court stated:

> The extent of the upward departure is certainly proportionate to the sentencing offense and the factors on which the upward deviation is based. I find that each of those factors that were previously affirmed warrant a departure independently and warrant an upward departure to the extent I've just articulated. And, certainly, the combination of two or more of these factors means that such a departure is proportional.

II. ANALYSIS

A. THE DEPARTURE

When this Court reviews a departure from the sentencing guidelines range, whether a factor that may justify an upward departure exists is a factual determination reviewed for clear error. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). Whether a factor is objective and verifiable is reviewed de novo, while whether a factor is a substantial and compelling reason to depart from the sentencing guidelines is reviewed for an abuse of discretion. *Id.* at 265. The extent of the departure is also reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). An abuse of discretion occurs when the minimum sentence falls outside the range of principled outcomes. *Id.* When determining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Babcock*, 469 Mich at 270.

At the outset, we emphasize that there is no dispute regarding the reasons the trial court identified for the upward departure or that those reasons were affirmed by this Court in the prior

appeal. *Solernorona*, unpub op at 12-13. Thus, the only issue is whether the extent of the departure was proportional and, therefore, not an abuse of discretion.

"A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). When there is a departure from the guidelines range, the sentence must be proportionate to the seriousness of the defendant's conduct and criminal history. *Smith*, 482 Mich at 300. To be proportionate, the sentence must be more appropriate to the offense and the defendant than a sentence within the guidelines range would have been. *Id.* at 318. When a sentence is a departure, "the statutory guidelines require more than an articulation of reasons for *a* departure; they require justification for the *particular* departure made." *Id.* at 303. Therefore, the trial court "must justify *on the record* both the departure and the extent of the departure." *Id.* at 313. The *Smith* decision explained:

> [I]f it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified. A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear. When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been. [*Id.* at 304 (footnotes omitted).]

The trial court used the same method for departure as it did in the original sentencing, which was moving two cells to the right in the guidelines grid to account for the factors cited for departure, which were not otherwise accounted for and given weight in the scoring of the guidelines. Defendant's scoring placed him at C II (defendant had a PRV score of 20 and an OV score of 30), and the trial court sentenced him as if he were in the E II cell. Regarding reference to the sentencing range grid, *Smith* stated:

> Certainly, a trial court that is contemplating a departure is not *required* to consider where a defendant's sentence falls in the sentencing range grid. However, we think that reference to the grid can be helpful, because it provides objective factual guideposts that can assist sentencing courts in ensuring that the "'offenders with similar offense and offender characteristics receive substantially similar sentences.'" [*Smith*, 482 Mich at 309 (footnotes omitted).]

The trial court did not abuse its discretion in sentencing defendant to the extent it did above the guidelines. The trial court articulated that the reasons for departure were not appropriately scored and that moving two adjacent cells provided the appropriate sentence as if those factors were scored. Although the trial court did not specifically address why it was moving the two adjacent cells or assigning values to inadequately scored variables, it was clear that the trial court adjusted defendant's minimum sentence by two adjacent cells to compensate for the factors not accounted for or inadequately accounted for in the guidelines. Moreover, unlike *Smith*, the departure sentence is not "off the charts." *Smith*, 482 Mich at 308-309. For an offender with defendant's OV level of II, the maximum minimum sentence range is 126 to 210 months, and for an offender with defendant's PRV level of C the maximum minimum sentence

range is 135 to 225 months. The trial court sufficiently justified the extent of the departure and did not abuse its discretion. *Smith*, 482 Mich at 300, 303.

Nevertheless, defendant argues that the extent of the departure imposed at resentencing exceeded the extent of the departure at the original sentencing and bases this argument on what percentage the actual sentence exceeded the recommended sentence. Notably, however, the trial court did not rely on percentages when imposing the departure either at the original sentencing or at resentencing, and instead utilized the same formula of moving two adjacent cells in the applicable sentencing grid. This formula appears to reflect a concern that the factors identified by the trial court were not accounted for in the scoring variables, and *Smith* recognized that "reference to the grid can be helpful[.]" *Smith*, 482 Mich at 309.

B. SCORING ISSUES

Defendant also argues that PRV 7 and OV 14 were improperly scored. When a case is remanded for resentencing, it is before the trial court in presentence posture. *People v Rosenberg*, 477 Mich 1076; 729 NW2d 222 (2007). The issue of scoring PRV 7 was preserved because defendant objected at resentencing. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Regarding OV 14, although defendant raised the issue at the original sentencing, it was not raised in the prior appeal and was not raised at resentencing. Thus, the scoring of OV 14 was not preserved. See MCL 769.34(10); *Rosenberg*, 477 Mich 1076; *Kimble*, 470 Mich at 310.

A trial court's factual determinations concerning the sentencing guidelines "are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.* "A presentence report is presumed to be accurate and may be relied on by the trial court unless effectively challenged by the defendant." *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). When a scoring issue is not preserved, as OV 14 was not preserved in this case, it is reviewed for plain error affecting substantial rights. *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007).

1. PRV 7

MCL 777.57 defines PRV 7 and provides that if the offender has two "or more subsequent or concurrent convictions," it is scored at 20 points. MCL 777.57(1)(a). The statute also provides, "Score the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed." MCL 777.57(2)(a).

The sentencing offense at issue occurred in December 2008. *Solernorona*, unpub op at 1-2. According to the PSIR, defendant committed three federal crimes on May 1, 2007, for which he was arrested on February 5, 2009 and convicted November 19, 2009. The conviction date of November 19, 2009 was subsequent to defendant committing the instant sentencing offense in December 2008. Defendant nevertheless argues that PRV 7 should not be scored because the

federal conviction was not subsequent to the state conviction. However, the plain language of MCL 777.57(2)(a) is that PRV 7 is scored "if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was *committed*." (Emphasis added.) Defendant's interpretation, that PRV 7 should not be scored because the federal conviction was not subsequent to the state conviction, ignores the plain language of the statute, which refers to when the state offense was "committed." *People v Mattoon*, 271 Mich App 275, 278; 721 NW2d 269 (2006). Thus, defendant's argument lacks merit.

2. OV 14

OV 14 concerns the offender's role and is scored ten points when "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). Additionally, "[i]f 3 or more offenders were involved, more than 1 offender may be determined to have been a leader." MCL 777.44(2)(b).

OV 14 was properly scored at ten points because there is evidence to support that defendant was a leader. The PSIR states that the confidential informant identified defendant as the organizer of the planned crimes. The PSIR also states that defendant "had given the confidential informant instructions and also included the acquisition of disguised wigs, mustaches, and the likelihood of possibly rental cars." The PSIR is presumed to be accurate, and the trial court may rely on it. *Callon*, 256 Mich App at 334. Additionally, the meeting to plan the robbery was held at defendant's home, where two handguns were recovered as well as a computer and note cards. The computer's history revealed prior searching for the Darakjian jewelry store and obtaining directions to the store, and the note cards had a checklist of things for the men to do and what they should avoid during the robbery. *Solernorona*, unpub op at 2. The trial court did not clearly err in making factual findings regarding the scoring of OV 14 at 10 points, and those facts support the score by a preponderance of the evidence.

Defendant raises two additional issues in his brief, though neither is included in the questions presented. Ordinarily, no issue will be considered that is not set forth in the statement of questions presented. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). However, we will address the arguments for the sake of completeness.

First, defendant argues that there are disparities between his sentence and his codefendants' sentences and the only difference is that he exercised his right to go to trial. Defendant was sentenced to 15 to 50 years while one codefendant was never charged, one pleaded guilty to a misdemeanor, one was sentenced to 3 to 40 years, and two were sentenced to 3-1/2 to 40 years. Defendant argues there is no explanation for the disparity.

This Court has recognized that the disparity between sentences of codefendants may be explained when a codefendant cooperates with the government. *People v Page*, 83 Mich App 412, 420; 268 NW2d 666 (1978). Moreover, "[s]entences are to be individualized and tailored to fit the offender[,]" and "[t]here is no requirement that a court consider the sentence given to a co-participant in the crime in sentencing a defendant." *People v Bisogni*, 132 Mich App 244, 245-246; 347 NW2d 739 (1984). Thus, defendant's argument concerning the difference between his sentence and that of his codefendants who cooperated with authorities has no merit.

Second, defendant argues that he should be resentenced before a different judge, but because there is no need for a remand, this issue is moot.

3. JUDICIAL FACT-FINDING

Finally, defendant argues that his rights under the Sixth and Fourteenth Amendments to the United States Constitution were violated by judicial fact-finding, which increased the floor of the permissible sentence in violation of *Alleyne v United States*, 570 US ___; 133 S Ct 2151, 2155; 186 L Ed 2d 314 (2013). However, our Court just recently held that *Alleyne* does not apply to our indeterminate sentencing scheme because the judicial fact-finding under the guidelines does not establish a mandatory minimum, but instead falls "within the 'broad sentencing discretion, informed by judicial fact[-]finding, [which] does not violate the Sixth Amendment.'" *People v Herron*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 309320, issued December 12, 2013), slip op at 7, quoting *Alleyne*, 570 US at ___; 133 S Ct at 2163.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray
/s/ Michael J. Riordan